IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 25, 2009

CHARLES BENNY SEABOLT, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Claiborne County
No. 12,175 E. Shayne Sexton, Judge

No. E2008-01416-CCA-R3-PC - Filed March 16, 2009

The petitioner, Charles Benny Seabolt, Jr., appeals from the Claiborne County Criminal Court's denial of his petition for post-conviction relief. On appeal, he alleges that he is entitled to relief because his trial counsel was ineffective and that he was denied due process. Upon review, we discern no error in the post-conviction court's determination that trial counsel was not ineffective, and we hold that the petitioner has waived his due process issue.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Brian J. Hunt, Clinton, Tennessee, for the appellant, Charles Benny Seabolt, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; William Paul Phillips, District Attorney General; and Jared R. Effler and Amanda Sammons, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On April 22, 2003, a Claiborne County jury convicted the petitioner of aggravated burglary, aggravated rape, especially aggravated kidnapping, and assault. The trial court sentenced the petitioner to an effective 56 years' incarceration. The petitioner appealed his sentence, and this court upheld his convictions; however, we modified his sentence to an effective 53 years' incarceration. *State v. Charles Benny Seabolt, Jr.*, No. E2005-02038-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, Oct. 5, 2006), *perm. app. denied* (Tenn. Feb. 26, 2007).

The petitioner's convictions result from a July 21, 2002 incident at a residence located at 182 Cardwell Lane in Claiborne County. *Id.* On that day, Jessica Johnson, the rape victim, drove with her three-year-old daughter to the residence, which belonged to her mother, to help her move. *Id.*, slip op. at 2. Although she noticed a green vehicle behind her, she parked in the residence's driveway "without incident." *Id.* Once in the house, the victim "spotted in the driveway a green

automobile driven by a man [later identified as the petitioner] wearing glasses and a black shirt." *Id.* The man "parked in the driveway and approached the front porch." *Id.*

The victim testified that she "opened the door 'a little,'" and the man asked if she knew where "Jack Richardson" lived. *Id.* The victim stated that she did not know Mr. Richardson and suggested that the petitioner ask some residents down the road. *Id.* She testified,

> The [petitioner] then pushed her, and they fell to the floor. They struggled, and Ms. Johnson tried to stab the [petitioner] with a pair of scissors and hit him with a vase. The [petitioner] disarmed her and began choking her. Ms. Johnson lost consciousness, but when revived, she ran to the laundry room to search for a firearm. Her daughter was in one of the back bedrooms, and the [petitioner] was holding the bedroom door shut, keeping the child confined inside the bedroom.
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> The [petitioner] then chased Ms. Johnson, pulled her out of the laundry room and down the hallway. Ms. Johnson managed to escape from the [petitioner] and ran toward the living room door, but when she realized that her daughter was not following her, she stopped. Ms. Johnson asked the [petitioner] what he wanted, implored him not to hurt her or her daughter, and assured him that she would not say anything. The [petitioner] again pulled her down the hallway. They entered an empty bedroom, and the [petitioner] locked the door. Ms. Johnson went into the adjoining bathroom and tried unsuccessfully to open the window. She returned to the bedroom where the [petitioner] was removing his clothes. She testified that she could hear her daughter crying.
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> The [petitioner] grabbed and pulled her to the floor. He unbuttoned and unzipped her pants, and he began touching her. He removed Ms. Johnson's tampon and then proceeded to rape her. After he ejaculated, the [petitioner] released Ms. Johnson.

Id. The victim then dressed, picked up her child, and ran outside and into her vehicle. *Id.* The petitioner reappeared while she backed the vehicle, and he "warned her against talking to anyone." *Id.* As the petitioner drove his car away, the victim recorded his license tag number. *Id.*

Because the residence's telephone service had been disconnected, the victim drove to neighbor Lori Widner's house to ask for help and contact 9-1-1. *Id.* Medical personnel arrived and performed a "rape kit" on the victim. *Id.* The victim explained that her injuries included "'a busted lip,' choke marks on her neck, abrasions on the back of her neck, arms and knuckles, and a thumb injury." *Id.* The following morning she observed "marks on [her daughter's] neck, arms[,] back, and one leg." *Id.*

An agent from the Tennessee Bureau of Investigation testified that he analyzed DNA from the victim's vaginal swab, and "[t]he results of his analysis showed that the sperm isolated on the vaginal swabs matched the [petitioner's] blood standard." *Id.*, slip op. at 3. The petitioner's blood sample was obtained by Claiborne County Sheriff Deputy Shawn Cupp, who "obtained the [petitioner's] permission to draw blood and to search the [petitioner's] property and premises." *Id.* Deputy Cupp and Deputy Julie Luckadoo witnessed the blood sample being drawn and delivered it to Detective John Malone for later analysis. *Id.*

Deputy Ernie Womack arrested the petitioner later on July 21, 2002, after receiving a police bulletin advising him to be on the lookout for the petitioner. *Id.*, slip op. at 4. After pulling over the petitioner's vehicle, he handcuffed the petitioner and placed him in the back of his patrol vehicle. *Id.* Deputy Womack "sought the defendant's consent to search the [petitioner's vehicle], and the petitioner "'looked up at [Deputy Womack,] and [the petitioner] told [Deputy Womack] that [he] could save [the deputy] a lot of time, there was no need in searching his car . . . [because the deputy] had found the guy [the deputy] was looking for.'" *Id.*

Detective David Honeycutt met with the petitioner and interviewed him "around midday" on July 21. At trial,

> Detective Honeycutt identified the [petitioner's] signed statement and read from the statement, in which the [petitioner] claimed that he followed Ms. Johnson and that when he approached the house, she was standing in the doorway. The [petitioner] said that he asked her if she knew Jack Richardson – a fictional person. Ms. Johnson said that she did not know anyone by that name, and she informed the [petitioner] that no one else was present at the house. According to the [petitioner] at that point, he "grabbed her and [they] started struggling." The struggling eventually ceased, and the [petitioner] said that they sat on the floor talking. Ms. Johnson offered to perform oral sex on the [petitioner] if he would not harm her or the child, who was in the room. The [petitioner] agreed, and he told Detective Honeycutt that Ms. Johnson then searched through the house and her automobile trying to locate a condom. Her efforts were unsuccessful, and she and the [petitioner] "talked some more" and went to an empty bedroom. The [petitioner] claimed that Ms. Johnson went to the bathroom to remove a tampon, and when she returned she spread out on the floor, and the couple had sex. After the [petitioner] ejaculated, they dressed, and Ms. Johnson ran out of the bedroom to find her daughter. The [petitioner] followed and found Ms. Johnson and the child outside in their vehicle. The [petitioner] told Detective Honeycutt that Ms. Johnson swore not to say anything. The [petitioner] drove to his house where he and his wife got into a "fuss." The [petitioner] left and was driving on Blue Top Road when Detective Womack stopped him. The [petitioner] told Detective Honeycutt that he decided he was

> going to have sex with Ms. Johnson "when [he] was told by her at the door that no one else was there and [he] grabbed her."

Id.

The petitioner testified in his own defense at trial. He argued that the statement by Detective Honeycutt "was untrue." *Id.* He insisted that the victim consented to sex with him, but he did not deny following her in his vehicle. *Id.* Although the petitioner did not contest that the victim was injured, "he disputed how the injuries occurred." *Id.*, slip op. at 4-5. He denied injuring the child victim or locking her in the bedroom, and he maintained that the victim accidentally injured her child. *Id.*, slip op. at 5. The petitioner also testified,

> [A]s he and Ms. Johnson were leaving the residence, he "thanked" her, and she replied, "[N]o, it's nothing. You're welcome." As for his incriminating statement, the [petitioner] testified that Detective Honeycutt pressured him to sign the document and warned the [petitioner] that the statement would not be rewritten. When asked on redirect examination if he believed that Ms. Johnson consented to the intercourse, the [petitioner] answered that "she might have because she was afraid that I might hurt her." In a letter to his wife mailed after his arrest, the [petitioner] wrote that "they are calling it rape . . . because I scared her into having sex so it is still rape."

Id. The jury convicted the petitioner based on the evidence as summarized above.

The petitioner took a "shotgun approach" in filing his petition for post-conviction relief; however, we will only discuss the issues presented on appeal. The petition and amended petition for post-conviction relief alleged that trial counsel performed deficiently by failing to challenge the introduction of the petitioner's consent for the drawing of a blood sample and by failing to challenge the chain of custody of the blood sample. He alleged that trial counsel performed deficiently by failing to have the petitioner psychologically evaluated "to determine if mitigating factors existed or to present expert testimony concerning [the petitioner's] psychological background during the sentencing phase of the [p]etitioner's trial." He argued that trial counsel performed deficiently by failing to review the statements of the child victim and by failing to challenge "juror Helton" because "she had known the state witness Lori Widner since high school." The petitioner also alleged that trial counsel inadequately interviewed and communicated with him in preparation for trial. Lastly, the petitioner claimed he had been denied due process because his statement given to Detective Honeycutt was not voluntarily and knowingly given.

At the post-conviction evidentiary hearing, counsel testified that, at the time he represented the petitioner at trial, he served as an assistant public defender. Regarding the issue of the petitioner's blood sample, he stated that he explained to the petitioner that signing the agreement to provide a blood sample would prevent him from challenging the chain of custody at trial. Counsel made no objection "in terms of how that was taken and who it was delivered to at the police department and where it went from there." He acknowledged that the DNA from the blood sample

matched that of spermatozoa found from the rape victim's vaginal swab; however, he maintained he did not challenge the evidence because "[the petitioner] maintained that the issue in this case was one of consent," and the DNA testing "somewhat corroborated" his consent defense.

Counsel testified the petitioner underwent a psychological examination "for the two-fold issue of . . . competency to stand trial as well as suffering from any disease or defect at the time of the commission of the alleged offense." He stated that he and the petitioner never discussed conducting further psychological examinations, and he had no reason to doubt the results of the first evaluation. Counsel stated that the petitioner had "some minor prior history," but he did not recall the petitioner's advising him of "any long term mental health commitments or anything of that nature." Counsel stated that, although he did not call any witnesses for the sentencing hearing, the petitioner did not suggest any.

Counsel testified that his routine practice during a jury trial was to confer with the client before and after each round of prospective jurors and to communicate with his client as the jurors were questioned during voir dire. He could not remember the petitioner's calling any particular juror to his attention. He explained, "I have never picked a jury in Claiborne County without somebody on the jury panel knowing somebody, either defense team, prosecution team, witnesses, law enforcement," and he agreed with the State that simply knowing a witness "doesn't necessarily preclude them from being a favorable [d]efense juror."

Although counsel could not recall reviewing an audio recording of an interview with the child victim, who was three years old at the time of the offense, he admitted that the statement had been made available to him through discovery. He explained, "I don't believe the child testified, and I think the State had said . . . they weren't g[oing] to call the child to testify." He also stated that he "didn't think it was wise" to call the child victim "based on [the petitioner's] representation . . . as to what had happened," and he did not believe a three-year-old girl was competent to testify. He acknowledged the possibility that the recording may have rebutted the rape victim's version of the events; however, neither the recording nor the contents of the statement were submitted to the post-conviction court for review.

Lastly, counsel testified that he spoke with the petitioner a "[c]ouple dozen" times leading up to trial.

Detective Honeycutt and Detective Malone testified about the petitioner's statement given after his arrest. Detective Honeycutt explained that he wrote the petitioner's statement and that the petitioner never disputed the accuracy of the transcription of the statement. He testified that the interview was "probably a couple of hours at the most," and he never witnessed the petitioner fall asleep or "nod off." The detectives did not recall the petitioner's asking for an attorney or wanting to stop the interview. Detective Honeycutt described him as "quite cooperative"; however, he recalled that the petitioner complained of pain from a toothache and that he requested Orajel. Detective Honeycutt acknowledged that the interview was neither video- nor audio-recorded.

The petitioner testified he did not know that his consent for a blood sample would result in an inability to challenge the DNA evidence against him. He said, "I asked [counsel] if I

signed the paper if I'd be able to challenge the chain of custody . . . and he told me at the time I could." The petitioner testified that counsel "didn't have nobody [sic] questioned to see if I was sane at the time that I did this." He stated that he was molested when he was 11 years old; however, he could not recall if he mentioned this to counsel. The petitioner said, "I believe that [counsel] didn't question the victim effectively." The petitioner maintained that counsel never conferred with him about jury selection and that the petitioner did not want "Helton" or "a medical examiner" on the jury. He said, "[Counsel] picked who he wanted and told me not to worry about it." The petitioner also stated that counsel met with him "[o]ne time . . . besides the [c]ourt appearances." On cross-examination, the petitioner admitted that the DNA evidence did not damage his case because he maintained that the victim consented to having sex with him.

At the close of proof, the post-conviction court first noted "no reason to revisit" the constitutionality of admitting the petitioner's statement. The trial court had previously ruled on the matter, and the post-conviction court noted that "counsel did a very adequate job in attacking the statement." The post-conviction court credited counsel's testimony and denied the petition. It noted, "The defense in this case was consent . . . it would be foolhardy for any trial counsel to . . . muddy the water by raising other defenses." The post-conviction court found "the credibility of the witnesses, with the exception of the petitioner, to be good, credible . . . much stronger . . . than that of the petitioner."

The petitioner raises two issues on appeal. First, the petitioner argues that the post-conviction court erred in dismissing his petition because trial counsel was constitutionally deficient. Second, the petitioner alleges that he was denied due process through the admission of his "involuntary" statement. Discerning no error, we affirm the post-conviction court.

I. Due Process

The petitioner alleges that his statement made to Detectives Honeycutt and Malone was "not voluntarily and knowingly given." The State argues that "the petitioner has waived this claim by failing to raise this issue on direct appeal." We agree with the State. Code section 40-30-106(g) states in pertinent part, "A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." T.C.A. § 40-30-106(g). The petitioner filed an unsuccessful motion to suppress this statement at trial; however, on direct appeal he failed to raise the issue. *See Charles Benny Seabolt, Jr.*, slip op. at 1, 5. We hold that the petitioner has waived this issue and affirm the post-conviction court's order denying relief on this ground.

II. Ineffective Assistance of Counsel

The petitioner, in his brief, cites to five "examples" of trial counsel's deficiencies. When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense."

Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687, 104 S. Ct. at 2064. It is not necessary, however, that absent the deficiency, the trial would have resulted in an acquittal. *Id.* at 695, 104 S. Ct. at 2068. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

The petitioner first cites counsel's "failure to object to the introduction of . . . [p]etitioner's consent to drawing of a blood sample with said consent not being freely, voluntarily and knowingly given and [counsel's] failure to file a motion to suppress [the petitioner's] consent for the drawing of a blood sample." The petitioner also argues that counsel was deficient in failing to challenge the chain of custody of the DNA evidence. However, during the evidentiary hearing, the petitioner admitted that, because he claimed the victim's consent as his sole defense against the rape charges, the DNA evidence did not damage his case. The petitioner testified in trial and the evidentiary hearing that he had sex with the victim. Evidence of his DNA found from the "rape kit" corroborates his testimony and does not prejudice his case. Challenging the chain of custody or the defendant's consent of the blood sample would do nothing to aid his defense. As the post-conviction court properly noted, it would only "muddy the water" to the disservice of the petitioner.

Next, the petitioner argues that counsel was ineffective by "fail[ing] to have [p]etitioner psychologically evaluated to determine if mitigating factors existed or to present expert testimony concerning defendant's psychological background during the sentencing phase."

However, the testimony adduced at the hearing shows no such deficiency. The petitioner received a psychological evaluation that established that he was competent to stand trial and that the insanity defense was unavailable to him. The petitioner could not remember if he told counsel about being molested as a child. Counsel testified that nothing about the petitioner's behavior or history made him doubt the results of the petitioner's psychiatric evaluation. Counsel could not recall the petitioner's offering any witnesses for him to present at the sentencing hearing. The petitioner has simply failed to show how counsel's performance was deficient, especially in light of the fact that the petitioner received a mental evaluation.

The petitioner also argues that counsel "failed to challenge juror Helton after this juror testified that she had known state witness Lori Widner since high school." His brief states no further argument or authority on this point. Indeed, at the evidentiary hearing no evidence was presented as to how "juror Helton" prejudiced the petitioner's case except for an implication that the juror's familiarity with Ms. Widner was per se prejudicial. Counsel testified that, in Claiborne County, he rarely experienced a jury where a juror did not know somebody involved in the trial and that did not affect the viability of the jury. The petitioner has failed to meet his burden.

The petitioner further argues that counsel "failed to review [the child victim's] statement to the police who was present at the scene of the crimes which could have contained exculpatory information." Once more, petitioner fails to cite legal authority or explain the prejudicial effect of failing to investigate the statement. Further, we note that petitioner did not present the content of these statements to the post-conviction court; therefore, we cannot determine how the statement affected the petitioner's trial. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (when alleging that counsel did not properly investigate a witness, the petitioner generally fails to establish his claim without presenting the witness to the court because the post-conviction court may not speculate "on the question of . . . what a witness's testimony might have been if introduced" at trial); *see also Wade v. State*, 914 S.W.2d 97, 102 (Tenn. Crim. App. 1995). Additionally, counsel testified that the child victim was not competent to testify, and he opined that calling her as a defense witness would do a disservice to the petitioner.

Lastly, the petitioner claims that counsel failed to properly investigate by only interviewing him for ten minutes. Counsel testified that he met with the petitioner a "[c]ouple dozen" times, and the post-conviction court clearly credited this statement over the petitioner's implausible testimony. We will not disturb the post-conviction court's determination of witnesses' credibility, and we hold, once again, that the petitioner has failed to meet his burden.

III. Conclusion

The petitioner has failed to meet his burden of showing, by clear and convincing evidence, that counsel performed deficiently and that such deficiencies prejudiced his defense. Further, the petitioner waived his due process claim by failing to raise the issue on direct appeal. Discerning no error, we affirm the post-conviction court's denial of his petition for post-conviction relief.

JAMES CURWOOD WITT, JR., JUDGE